

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AQUASMART TECHNOLOGIES, INC.,

Plaintiff,

v.

AQUASMART, INC.,

Defendant.

Case No. 08 Civ. 1813 (KMK)

ECF Case

ANSWER

Defendant Aquasmart, Inc. ("AS"), by and through its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, as and for its Answer to the Complaint filed by Plaintiff Aquasmart Technologies, Inc. ("ATI"), alleges as follows:

"I. INTRODUCTION"

1. AS states that paragraph numbered "1" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, AS denies that any of its conduct gave rise to any acts of wrongdoing.

2. AS states that paragraph numbered "2" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, AS denies that any of its conduct gave rise to any acts of wrongdoing.

3. AS denies each and every allegation contained in paragraph 3 of the Complaint, except denies knowledge or information sufficient to form a belief concerning the truth of the allegation that an alleged "disgruntled [AS] customer" supposedly

complained to ATI, and admits receiving a letter from ATI's counsel in or about May 2006 notifying AS about ATI's objections to the alleged use of ATI's trademark.

4. AS states that paragraph numbered "4" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, ASI denies that any of its conduct gave rise to any acts of wrongdoing or that Plaintiff is entitled to any relief whatsoever.

"II. PARTIES"

5. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the first paragraph numbered "5" of the Complaint.

6. AS denies each and every allegation contained in the second paragraph numbered "5[sic]" of the Complaint, except admits that AS, under its true corporate name (Aquasmart, LLC), conducted business from 106 Purdy Avenue, Port Chester, New York, 10573 and was in the business under its true corporate name of providing bottleless water coolers and replacement filters for those units to its limited number of customers, and further states that it has changed its corporate name.

"III. JURISDICTION AND VENUE"

7. AS states that paragraph numbered "6" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, AS denies each and every allegation contained in paragraph numbered "6" of the Complaint.

8. AS states that paragraph numbered "7" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is

required, ASI denies each and every allegation contained in paragraph numbered "7" of the Complaint.

9. AS states that paragraph numbered "8" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, AS denies each and every allegation contained in paragraph numbered "8" of the Complaint.

10. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the paragraph numbered "9" of the Complaint.

11. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the paragraph numbered "10" of the Complaint.

12. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the paragraph numbered "11" of the Complaint.

13. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the paragraph numbered "12" of the Complaint, except admits that ATI did not authorize AS to use any trademarks ATI may possess.

14. AS denies knowledge or information sufficient to form a belief concerning the truth of the allegations contained in the paragraph numbered "13" of the Complaint.

15. AS denies each and every allegation contained in paragraph numbered "14" of the Complaint.

16. AS admits the allegations in paragraph numbered "15" of the Complaint.

17. AS denies each and every allegation contained in paragraph numbered "16" of the Complaint, except admits that AS' former website was registered in or about 2003.

18. AS admits the allegations in paragraph numbered “17” of the Complaint.

19. AS denies each and every allegation contained in paragraph numbered “18” of the Complaint.

20. AS denies knowledge or information concerning the allegations contained in paragraph numbered “19” of the Complaint, except admits and avers that for a period of time AS used the term “Aquasmart”, and further avers that the mark “Aquasmart” is and has been commonly used by a wide range of businesses selling water-related products or services.

21. AS denies each and every allegation contained in paragraph numbered “20” of the Complaint, except admits receiving a copy of the letter attached as Exhibit B to the Complaint and respectfully refers the Court to the letter for its full contents.

22. AS admits the allegations contained in the paragraph numbered “21” of the Complaint, and further respectfully refers the Court to the letter attached as Exhibit C for its full contents.

23. AS denies each and every allegation contained in paragraph numbered “22” of the Complaint, except admits receiving a copy of the letter from an attorney for ATI that is attached as Exhibit D to the Complaint, and respectfully refers the Court to the letter for its full contents.

24. AS denies each and every allegation contained in paragraph numbered “23” of the Complaint, except admits that counsel for AS and ATI corresponded until September 2007 concerning ATI’s claims of trademark infringement. AS further states that in the last of those communications, counsel for ATI “thank[ed]” counsel for AS for having transmitted to ATI a counterproposal to resolve the matter and further stated that

he would "seek instructions" from ATI. AS also further states that no subsequent communications were received by AS from ATI on the matter until AS was advised, in or about March 2008, that ATI had or would file a lawsuit. AS further admits that prior to the filing of this lawsuit AS had ceased promoting its services through an online website using the term "Aquasmart".

25. AS denies each and every allegation contained in paragraph numbered "24" of the Complaint.

26. AS denies each and every allegation contained in paragraph numbered "25" of the Complaint.

27. AS denies each and every allegation contained in paragraph numbered "26" of the Complaint.

"COUNT I"

28. AS repeats and realleges its responses to the allegations contained in paragraphs numbered "1" through "27" of the Complaint as if fully set forth herein.

29. AS states that paragraph numbered "28" of the Complaint contains legal assertions to which no response is required. However, to the extent a response is required, AS denies each and every allegation contained in paragraph numbered "28" of the Complaint.

30. AS denies each and every allegation contained in paragraph numbered "29" of the Complaint.

31. AS denies each and every allegation contained in paragraph numbered "30" of the Complaint.

32. AS denies each and every allegation contained in paragraph numbered "31" of the Complaint.

33. AS denies each and every allegation contained in paragraph numbered "32" of the Complaint.

34. AS denies each and every allegation contained in paragraph numbered "33" of the Complaint.

"COUNT II"

35. AS repeats and realleges its responses to the allegations contained in paragraphs numbered "1" through "33" of the Complaint as if fully set forth herein.

36. AS denies each and every allegation contained in paragraph numbered "35" of the Complaint.

37. AS denies each and every allegation contained in paragraph numbered "36" of the Complaint.

38. AS denies each and every allegation contained in paragraph numbered "37" of the Complaint.

39. AS denies each and every allegation contained in paragraph numbered "38" of the Complaint.

40. AS denies each and every allegation contained in paragraph numbered "39" of the Complaint.

41. AS denies each and every allegation contained in paragraph numbered "40" of the Complaint.

42. AS denies each and every allegation contained in paragraph numbered "41" of the Complaint.

"COUNT III"

43. AS repeats and realleges its responses to the allegations contained in paragraphs numbered "1" through "41" of the Complaint as if fully set forth herein.

44. AS denies each and every allegation contained in paragraph numbered "43" of the Complaint.

45. AS denies each and every allegation contained in paragraph numbered "44" of the Complaint.

46. AS denies each and every allegation contained in paragraph numbered "45" of the Complaint.

47. AS denies each and every allegation contained in paragraph numbered "46" of the Complaint.

"COUNT IV"

48. AS repeats and realleges its responses to the allegations contained in paragraphs numbered "1" through "46" of the Complaint as if fully set forth herein.

49. AS denies each and every allegation contained in paragraph numbered "48" of the Complaint.

50. AS denies each and every allegation contained in paragraph numbered "49" of the Complaint.

51. AS denies each and every allegation contained in paragraph numbered "50" of the Complaint.

52. AS denies each and every allegation contained in paragraph numbered "51" of the Complaint.

"COUNT V"

53. AS repeats and realleges its responses to the allegations contained in paragraphs numbered "1" through "51" of the Complaint as if fully set forth herein.

54. AS denies each and every allegation contained in paragraph numbered "53" of the Complaint.

55. AS denies each and every allegation contained in paragraph numbered "54" of the Complaint.

56. AS denies each and every allegation contained in paragraph numbered "55" of the Complaint.

57. AS denies each and every allegation contained in paragraph numbered "56" of the Complaint.

58. AS denies each and every allegation contained in paragraph numbered "57" of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

59. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

60. The Complaint is barred, in whole or in part, by the doctrines of waiver, consent and estoppel.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

61. The Complaint is barred by the equitable doctrine of laches.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

62. The Complaint is barred by the doctrine of acquiescence.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE


63. Plaintiff has failed and refused to mitigate its damages, if any, and any award of damages must therefore be diminished.

WHEREFORE, Defendant Aquasmart, Inc. respectfully requests that this Court enter judgment: (i) dismissing the Complaint as against Defendant Aquasmart, Inc.; and (ii) granting Defendant Aquasmart, Inc. such other and further relief as this Court deems just and proper.

Dated: May 6, 2008
White Plains, New York

**DelBello Donnellan Weingarten
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